

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs May 16, 2006

JOHN A. BOATFIELD v. STATE OF TENNESSEE

Appeal from the Criminal Court for Hamilton County
No. 243547 Rebecca Stern, Judge

No. E2005-01949-CCA-R3-PC - Filed July 31, 2006

This is an appeal from denial of post-conviction relief. The Petitioner, John A. Boatfield, was convicted upon a jury verdict of premeditated first degree murder and abuse of a corpse. He received concurrent sentences of life imprisonment and two years, respectively. This Court upheld his convictions on direct appeal. See State v. John A. Boatfield, No. E2000-01500-CCA-R3-CD, 2001 WL 1635447 (Tenn. Crim. App., Knoxville, Dec. 20, 2001). The Petitioner subsequently filed for and was denied post-conviction relief. He now appeals the trial court's denial of post-conviction relief, claiming that his trial counsel provided ineffective assistance of counsel and that his constitutional rights to due process were violated when the State withdrew its plea agreement. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and ROBERT W. WEDEMEYER, JJ., joined.

John G. McDougal, Chattanooga, Tennessee, for the appellant, John A. Boatfield.

Paul G. Summers, Attorney General and Reporter; Preston Shipp, Assistant Attorney General; Bill Cox, District Attorney General; and Bates Bryan, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

The facts underlying the convictions at issue in this case were set forth in detail by this Court on direct appeal as follows:

On March 12, 1998, firemen responded to a fire at the home of the defendant and discovered the defendant's wife, Emily Denise "Nicy" Boatfield, dead in her bed with bedclothes piled over her. A fire had been set beneath the bed using gasoline.

Kitchen matches, a .22 caliber shell casing, and the defendant's .22 caliber rifle were in the charred debris. The rifle was cocked with a round in the firing chamber. Arson investigator Alec Conner opined that the fire was typical of a fire set to conceal a crime. The fire was confined to the master bedroom.

The victim was shot in the head and stabbed twice in the abdomen. Her right leg and foot were burned and charred black. Dr. Frank King, Hamilton County medical examiner, testified the victim was first shot and then stabbed. According to Dr. King, the gunshot killed her within seconds; she was then stabbed as she died or soon thereafter; and she died before the fire started. He said the victim's right hand was not injured, nor did she have any defensive wounds. He estimated she died between 8:00 a.m. and 10:00 a.m.

Dr. King opined she was probably shot in bed, and it was highly improbable she was shot elsewhere and moved to the bed. Thick blood and tissue were around the pillow on the bed. He testified blood found elsewhere in the master bedroom and hall was disbursed from the bed after the victim's death, probably by the firemen. No foreign genetic material was found underneath the victim's fingernails. Forensic tests revealed the shell casing found was fired from the defendant's rifle. Dr. King stated the victim's stab wounds were consistent with the use of a single-edge knife blade.

The home showed signs of an apparent burglary. In the living room, the gun cabinet was opened by force, and a container of .22 caliber bullets, bearing the defendant's fingerprints, was spilled on the floor. A tire tool was found in the floor. Tommy McMillin, the defendant's son-in-law, identified the tire tool as one he had been using to repair a car in the Boatfields' backyard the day before the murder. McMillan said he left the tool in the backyard by an outbuilding.

Both the master bedroom and the bedroom belonging to the Boatfields' teenage daughter were ransacked. Jewelry boxes were open and their contents strewn. The back door, which had an ADT Security sticker on the window, appeared to have been forced open using the tire tool.

When officers arrived at the crime scene, they found televisions and a stereo in the home. Three guns were in the gun cabinet. The victim's jewelry, including diamond rings, a watch, necklace and earrings, were still on her body. A purse, pager, cellular telephone and keys were on the kitchen table. The defendant told insurance investigator Danny Walker that jewelry, silver bars, money and old coins were taken. He told Walker and the police that no guns were missing. He also told the police he had loaded the .22 caliber rifle to shoot at dogs, and it possibly had five rounds in it.

Officer Rick Phillips, who lived in the neighborhood, testified it was a safe neighborhood and 20 to 30 officers resided within four miles of the Boatfield home. The neighborhood is a high traffic area with homes adjacent to the Boatfield home located only 75 to 100 feet away. One belonged to Dee Newell, who kept three dogs in a fence close to the Boatfields' driveway. Officer Phillips and Inspector Michael Mathis testified that Newell's dogs barked most of the time they were present at the crime scene. Newell testified one of her dogs barked at strangers, but on the morning of the murder, she did not hear the dogs bark until the fire trucks arrived.

There was a sign in the front yard of the Boatfield home indicating it was monitored by ADT Security. The house and all of the yard are visible from the road. Two of the Boatfields' vehicles, the defendant's red truck and a Saturn, were parked in the driveway. The Boatfields' dog, a Chihuahua named Chico, would bark when someone entered the home and was protective of the victim. The defendant told insurance investigator Walker, his father-in-law Ray Smith, and the police that Chico was in the house. After the murder, Chico was found unharmed outside the house.

On the morning of the murder, the defendant and Candace Boatfield, the teenage daughter of the defendant and the victim, left home in the victim's new purple truck just before 7:00 a.m. They made a brief stop at the defendant's business, Nursery Brokers, and arrived at a restaurant for breakfast by 7:00 a.m. The defendant told Detective Charles Dudley that his wife was asleep when they left. Candace Boatfield testified they remained at the restaurant for an hour or less. Then the defendant took her to school, where they arrived at approximately 8:05 or 8:10 a.m. During the drive to school, the defendant told his daughter he was going to wash the truck, pick up parts for his dune buggy and go to work.

The defendant told Detective Dudley he returned home, where his wife was awake and watching television. He said she asked him to spend the day with her, but he declined because he had work to do. The defendant said he told her he would wash her truck. He also called his brother at Nursery Brokers.

According to telephone company records, a one minute phone call was placed from the Boatfield residence to Nursery Brokers at 8:57 a.m. Tommy McMillin testified the defendant called Nursery Brokers between 9:00 and 9:05 a.m. and then arrived at the business 15 to 20 minutes later. The defendant told Detective Dudley he left home some time after 9:00 a.m. In a recorded interview with insurance investigator Walker, the defendant said his wife was watching television when he left the house at 9:15. After the defendant arrived at Nursery Brokers, he left in the purple truck, stating he was going to wash the truck and pick up parts.

ADT Security Services received a fire alarm call from the Boatfield residence at 9:22 a.m. At 9:27 a.m., ADT called the defendant's business and a man stated the defendant was not there. McMillin testified he answered the telephone when ADT called and told them the defendant would return in 30 minutes.

The defendant told Detective Dudley he arrived at the carwash approximately 15 minutes after he left Nursery Brokers. Betty Grant and Virgil Garner, East Ridge Carwash employees, recalled the defendant arriving at the carwash at approximately 10:00 a.m. driving a purple truck. The defendant told Detective Dudley he was at the carwash for about five to ten minutes. According to the defendant's statement to Detective Dudley, he put gas in the truck and went to Capital Toyota where he stayed about 20 minutes.

He said he then went to Advance Auto Parts, where he spent about 30 minutes. Stephen Johns and Robert Massengale, employees of Advanced Auto Parts, recalled the defendant coming into the store that morning to pick up dune buggy parts. Johns said he offered to sell the defendant some old Volkswagen parts at a

reduced price, and, after a ten to fifteen-minute discussion, the defendant purchased them as well. He did not recall the defendant's request to use the telephone. Massengale recalled giving the defendant permission to use the telephone. The defendant told Inspector Michael Mathis he tried to call home and Nursery Brokers, but got no answer. Telephone records show no phone calls were placed from Advance Auto to the Boatfield residence or Nursery Brokers. The defendant completed his purchases at Advanced Auto at 10:55.

The defendant told insurance investigator Walker he proceeded to the car dealership after he left Advanced Auto and then went to the home of Alvin Walker, Jr., who was repairing the defendant's dune buggy. According to stipulated statements by Alvin Walker, Jr. and his father, Alvin Walker, Sr., Walker, Sr. answered the door and told the defendant there had been a fire at his house. The defendant replied that Walker, Sr. should not joke about things like that. When Walker, Sr. told the defendant his wife was found inside the house, the defendant fell to the ground screaming and crying. Walker, Jr. drove the defendant to his home, where the defendant refused to get out of the vehicle and asked Walker, Jr. to take him to his mother's home.

In the defendant's statement to Detective Dudley, he stated Walker, Sr. said he was sorry to hear about his wife. The defendant said he asked Walker, Sr. what he was talking about and Walker, Sr. told him his house had caught fire and his wife had died.

Martha McNabb, the victim's mother, testified that in January or February 1998, the victim called her after awaking to a suspicious fire in her bedroom, which apparently was started by a lit candle. She said the victim suspected the defendant or their daughter, Candace Boatfield, set the fire.

Inspector Mathis testified he interviewed the defendant in a car outside the defendant's residence at approximately 11:45 a.m. on the day of the murder. Mathis said the defendant held his head down and moaned with his hands covering his face. He observed others helping the defendant walk and get in and out of the vehicle as if he could not stand on his own. Mathis stated the defendant was aware his wife was dead. Mathis explained to him the police were investigating her death. Though the defendant's hands were covering his face, his eyes were darting to look at Mathis and to look out the window of the car. Mathis also noticed that although the defendant was making crying sounds, he was not shedding any tears. The defendant made comments indicating his wife was dead, such as, "She was my best friend." After Mathis ended the interview and as the defendant's sister helped the defendant out of the car, the sister told the defendant, "She's dead." The defendant responded, "I didn't know she was gone." Mathis testified he found it unusual the defendant never asked him what had happened to his wife, how she had died, or where she was.

Melody Jones, the victim's sister, testified that when the family gathered following the murder, she observed the defendant sitting down, leaning with his hands over his face, but looking at the victim's family through his fingers. She said while the defendant wailed and made noises, she did not see any tears. Jones said the

defendant made inconsistent statements about his and his wife's activities on the day of the murder. She testified he initially said the victim was asleep when he left the house, but later said she was watching television and it was playing so loudly he told her to turn it down because she would not hear if anyone entered the house. The defendant told Jones he took Candace to school in his red truck. He said he later returned home, and without going in, picked up the purple truck in order to clean it. Jones also testified she did not know of any injury to the victim's hand.

The victim's father, Ray Smith, said he asked the defendant if he killed his daughter. The defendant replied that he "never laid a hand on her." Smith said the defendant became extremely nervous, began shaking, and left.

On March 13, 1998, Detective Dudley and other officers made a videotape as they walked through the house with the defendant and interviewed him. Detective Dudley testified that to his knowledge, the defendant was not told about the stab wounds to the victim's abdomen at the time the tape was made. As the officers and defendant reviewed the contents of the gun cabinet, the defendant pointed out that a knife was missing. The defendant drew a picture of the knife, showing that it had a single-edge blade.

Insurance agency employee, Gina Hembree, testified the defendant came by her office on March 18, 1998, before the agency received the fire report. When Hembree inquired as to how the fire began, the defendant told her he thought urethane on a jewelry box was ignited by a lighter or a candle. He also stated he had only been gone fifteen minutes when the fire began. On March 27, 1998, the defendant visited Hembree's office again and told Hembree police had located a witness, who was "dern [sic] near beat to death and in a coma." As the defendant made this statement, he looked Hembree "dead in the eye," giving her pause because he had also asked her if the police had spoken with her. There is nothing in the record to indicate the police ever located a witness who had been beaten.

On March 20, 1998, insurance investigator Walker interviewed the defendant. Walker questioned the defendant regarding whether he kept flammable liquids such as gasoline, kerosene, charcoal lighter fluid, or paint thinner. The defendant replied he did not. On July 1, 1998, Walker was present when the defendant stated he kept paint thinner under the sink and an empty can of Coleman fuel in an outbuilding. The defendant told Inspector Michael Mathis that there might have been charcoal lighter fluid under the kitchen sink, and matches were kept in the kitchen drawer.

When Detective Dudley questioned the defendant regarding his financial condition, he said he was financially stable and owed nothing on his home. In May 1993, the defendant was injured while working at a foundry and lost his job. Ray Smith, the victim's father, testified he assisted the defendant in establishing the business, Nursery Brokers, so the defendant could support his family. Smith stated the business "took off" and did better than he expected. When Smith turned the business over to the defendant in January 1997, the business owed little debt. Smith described the defendant as a poor businessman. Smith testified that in November 1997, the business's checks to a supplier and for rent were returned for insufficient

funds. Other proof established the defendant had difficulty paying for telephone services and insurance.

In 1997, the Boatfields obtained an equity line of credit in the amount of \$44,000 secured by their home. Wayne Upchurch, the bank's branch manager, testified that "Nicy" Boatfield was very reluctant to enter into the loan agreement and wanted safeguards to ensure no funds could be withdrawn without both signatures. Mr. and Mrs. Boatfield signed a written agreement requiring both of them to sign before funds could be withdrawn on the line of credit. The Boatfields purchased credit life insurance to pay the loan in the event either of them died. As of March 12, 1998, the balance due on the line of credit was approximately \$50,000. On March 20, 1998, the defendant asked to file a claim on the credit life insurance. The defendant's claim was denied because the premium payments were delinquent at the time of the victim's death, which displeased the defendant. Later, the bank began foreclosure on the house. In addition to the credit life insurance, the defendant had insurance coverage on the house and its contents. The defendant told Walker during the March 20, 1998, interview his house payments were current, and he had just learned that they had credit life insurance to pay the outstanding balance.

Shortly before the murder, the Boatfields purchased a purple truck from Capital Toyota. Edward Virgil Emerson, a finance manager at the dealership, testified he assisted them with the financing. Emerson stated the victim was vehement about having the vehicle solely in her name because she would be making the payments and was upset when she learned that the only way financing could be obtained was to include the defendant. Emerson offered them credit life and disability insurance. The defendant asked if such insurance would pay for the vehicle if something happened to either of them. Emerson advised that coverage for both of them would be more expensive. The victim did not want to pay the extra expense for joint coverage, but the defendant agreed to pay for the additional expense. The insurance would have paid the debt on the vehicle upon the victim's death.

The victim was employed by the Dialysis Clinic, Inc. David Hagwood, director of human resources for the Dialysis Clinic, testified the defendant would have been entitled to benefits totaling \$87,700. On June 10, 1998, the defendant applied only for her retirement benefits, which were approximately \$15,700.

The Boatfield family members were close friends with Lonnie and Brenda Tripp and their children. They attended the same church and had vacationed together. Brenda Tripp also worked at the Dialysis Clinic. The Tripps' sons had worked at the defendant's business. In 1997, the Tripps began having marital problems, and at the time of the murder, they were divorcing. In August 1997, the defendant and Brenda Tripp traveled to Alabama to assist the Tripps' oldest son, whose car was disabled. In the months preceding the victim's death, numerous calls were made from the defendant's cellular telephone to Brenda Tripp's pager, home, place of employment, and cellular telephone. Likewise, numerous calls were made from Brenda Tripp's cellular telephone to Nursery Brokers, the defendant's cellular telephone, his pager and his home. The phone calls continued after the victim's death. The defendant

repeatedly told Inspector Michael Mathis he did not know Brenda Tripp's cellular telephone and pager numbers. Hours after Inspector Mathis interviewed Brenda Tripp on March 27, calls were placed between the defendant and Brenda Tripp.

The defendant was openly involved in a romantic relationship with Brenda Tripp after the victim's death. Inspector Michael Mathis testified that in June 1998, police intercepted telephone calls between the defendant and Brenda Tripp in which it was apparent they were physically intimate. The state presented a tape recording of a conversation between the defendant and Tripp from June 19, 1998, indicating the two were having sexual relations. In February 1999, the defendant sent a letter to Lonnie Tripp claiming he was not involved with Brenda Tripp before the Tripps' separation, but apologized to Tripp for betraying his friendship. In the letter, the defendant also stated he had prayed for God and the victim to forgive him.

Melody Jones, the victim's sister, testified the Boatfields had marital problems for years. Jones stated the victim suspected the defendant was having an affair with Brenda Tripp.

The defense presented the testimony of Candace Boatfield and Eddie Boatfield, the defendant's brother, who testified the victim's hand appeared swollen after her death. Eddie Boatfield testified the defendant screamed and cried hysterically after his wife's death. Officers also testified the defendant cooperated in the investigation by giving fingerprints, blood samples, interviews, and was willing to take a polygraph. Terry D. Traylor testified the defendant was not able to do lifting. The defense submitted medical records showing the defendant had undergone four surgeries on his cervical spine since his injury at work in 1993.

Tommy McMillin testified during cross-examination that when he saw the defendant at Nursery Brokers on the morning of the murder, there was no blood on the defendant's jacket; the defendant did not smell like gasoline; he did not appear to have been in a struggle; and he was behaving normally. The defendant's brothers testified for the defense that they found footprints approximately 100 feet behind the house at the back of the yard near the woods.

Candace Boatfield testified her mother knew the defendant went with Brenda Tripp to Alabama to assist Durand Tripp and was not upset. Candace Boatfield and Sharon Beaver testified Brenda Tripp and the victim slept in the same bed during a church trip to Gatlinburg two weeks before the murder. Witnesses testified the defendant's cellular telephone was used by many people, including Brenda Tripp's sons, who worked at Nursery Brokers.

Sabrina McMillin, the defendant's daughter from a prior marriage, testified for the defense that she listened to the tapes of the phone calls intercepted by the police from her father's and Brenda Tripp's phones and prepared a summary showing most of the phone calls were not between the defendant and Tripp. McMillin said she was never aware of any romantic relationship between Brenda Tripp and her father prior to the victim's death. Lonnie Tripp testified he did not accuse the defendant of being involved with his wife prior to the victim's death.

Candace Boatfield testified her parents continued to live together after the incident in which her mother found a candle burning by her bed, and her parents did not have any major arguments. She stated her mother joked about the candle incident. Officer Charles Russell testified he took a statement from the victim's mother, Martha McNabb, who said the victim did not name either the defendant or Candace Boatfield as a suspect who lit the candle in her bedroom.

John Hilhoit, administrator of the Dialysis Clinic, testified the victim earned over \$28,000 in 1997 and over \$26,000 in 1996. He confirmed the victim was being considered for a promotion at the time of her death.

Based on this evidence, the jury found the defendant guilty of premeditated first degree murder and abuse of a corpse.

Boatfield, 2001 WL 1635447, at *1-7.

In February of 2003, the Petitioner timely filed a pro se petition for post-conviction relief raising multiple issues, many of which are not cognizable in a post-conviction proceeding. In March of 2003, the trial court issued an order declaring the Petitioner had a colorable claim for post-conviction relief. A lawyer was appointed to represent the Petitioner. In July of 2004, an amended petition for post-conviction relief was filed, with the assistance of counsel, raising as grounds for relief ineffective assistance of counsel and jury misconduct. In December of 2004, the Petitioner filed a pro se supplemental amended post-conviction petition in which he again raised many of the same issues raised in his initial pro se petition, the majority of which are not cognizable in a post-conviction collateral attack.

At the initial post-conviction hearing, the Petitioner's trial counsel ("Counsel") testified that he had been practicing law since 1966, had extensive trial experience, and had previously worked in the District Attorney's Office. Counsel further stated that he thoroughly prepared for the Petitioner's trial and communicated with the Petitioner "quite often." Counsel testified that either he or the State questioned all the jurors as to whether they had a relationship with anyone involved in the trial. Counsel also stated that he did not request a change of venue because he believed it was not necessary and it could have actually been detrimental to the Petitioner. Additionally, Counsel noted that such decisions are ultimately up to the client, and the Petitioner did not request a change of venue.

Counsel testified that he was aware of other possible suspects, pursued all credible leads, and introduced alternative theories on cross-examination. Counsel admitted he did not cross-examine the medical examiner on the discrepancy between the examiner's oral testimony at trial, in which the examiner stated there were no defensive wounds on the victim, and the autopsy report, which indicated there were wounds on the victim's hands. Counsel further stated that in addition to the investigative work conducted by his office, he also hired a professional investigator. Counsel noted that he elected not to call the investigator to the stand at trial because his findings were not exculpatory.

Eddie Boatfield, the Petitioner's brother, testified that he found a beer can and footprints in the woods near the murder scene and a gas can in a neighbor's yard. Mr. Boatfield stated that Counsel should have focused more on this evidence, which the police dismissed as irrelevant. However, Mr. Boatfield admitted that Counsel did introduce this evidence at trial through the testimony of witnesses, himself included.

Melody Jones, the victim's sister, testified that she did not know any of the jurors at the Petitioner's trial. Candace Boatfield, the Petitioner's daughter, testified that she heard, through others, that Ms. Melody Jones told another person she knew one of the jurors, a pregnant woman, and it was this particular juror that pushed the other jurors for a conviction.

At the conclusion of the hearing, the Petitioner, through counsel, argued that he should be granted post-conviction relief due to ineffective assistance of counsel and a tainted jury. As to the claim of ineffective assistance, the trial court stated: "As disappointed as [the Petitioner] and I know his family is in the verdict, he got excellent representation by [Counsel]. [Counsel] pursued everything there was to pursue."¹ However, the trial court granted the Petitioner several continuances in order to give his post-conviction counsel time to track down the juror alleged to have engaged in misconduct by not revealing her relationship with one of the victim's relatives.² In July of 2005, the trial court denied the Petitioner relief and dismissed the post-conviction petition. This appeal followed.

ANALYSIS

On appeal, the Petitioner asserts that the trial court erred in denying his petition for post-conviction relief because his trial counsel provided ineffective assistance of counsel and because his due process rights were violated when the State withdrew its plea agreement. To support his first claim, the Petitioner argues that his trial counsel's representation was deficient because: (1) Counsel did not request a change of venue, (2) Counsel failed to conduct a proper investigation, and (3) Counsel failed to adequately cross-examine the medical examiner or detective on the issue of defensive wounds on the victim's hands. The Petitioner further claims these deficiencies led to actual prejudice in his case. As to his second issue, the Petitioner merely asserts his due process rights were violated when the "parties had an plea agreement that the State withdrew from at the last minute."

¹Although the trial court made some findings of fact and conclusions of law on the record during the proceedings, the record does not contain a written order stating the findings of fact and conclusions of law with regard to each ground. See Tenn. Code Ann. § 40-30-111(b). Nevertheless, we deem the record sufficient to allow appellate review.

²The Petitioner's post-conviction hearing was continued several times, resulting in an additional five appearances before the trial court on the following dates: May 16, May 23, June 6, June 20, and July 18 of 2005. The record reveals that the juror alleged to have known the victim's sister was never produced to testify at the post-conviction hearing.

To sustain a petition for post-conviction relief, a defendant must prove his or her factual allegations by clear and convincing evidence at an evidentiary hearing. See Tenn. Code Ann. § 40-30-110(f); Momon v. State, 18 S.W.3d 152, 156 (Tenn. 1999). Upon review, this Court will not re-weigh or re-evaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the trial judge, not the appellate courts. See Momon, 18 S.W.3d at 156; Henley v. State, 960 S.W.2d 572, 578-79 (Tenn. 1997). The trial judge's findings of fact on a petition for post-conviction relief are afforded the weight of a jury verdict and are conclusive on appeal unless the evidence preponderates against those findings. See Momon, 18 S.W.3d at 156; Henley, 960 S.W.2d at 578.

I. Ineffective Assistance of Counsel

Both the Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution guarantee a criminal defendant the right to representation by counsel. See State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999); Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Both the United States Supreme Court and the Tennessee Supreme Court have recognized that the right to such representation includes the right to “reasonably effective” assistance, that is, within the range of competence demanded of attorneys in criminal cases. See Strickland v. Washington, 466 U.S. 668, 687 (1984); Burns, 6 S.W.3d at 461; Baxter, 523 S.W.2d at 936.

A lawyer's assistance to his or her client is ineffective if the lawyer's conduct “so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland, 466 U.S. at 686. This overall standard is comprised of two components: deficient performance by the defendant's lawyer and actual prejudice to the defense caused by the deficient performance. See id. at 687; Burns, 6 S.W.3d at 461. The defendant bears the burden of establishing both of these components by clear and convincing evidence. See Tenn. Code Ann. § 40-30-110(f); Burns, 6 S.W.3d at 461. The defendant's failure to prove either deficiency or prejudice is a sufficient basis upon which to deny relief on an ineffective assistance of counsel claim. See Burns, 6 S.W.3d at 461; Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

In evaluating a lawyer's performance, the reviewing court uses an objective standard of “reasonableness.” See Strickland, 466 U.S. at 688; Burns, 6 S.W.3d at 462. The reviewing court must be highly deferential to counsel's choices “and should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.” Burns, 6 S.W.3d at 462; see also Strickland, 466 U.S. at 689. The court should not use the benefit of hindsight to second-guess trial strategy or to criticize counsel's tactics, see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982), and counsel's alleged errors should be judged in light of all the facts and circumstances as of the time they were made, see Strickland, 466 U.S. at 690; Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998).

A trial court's determination of an ineffective assistance of counsel claim presents a mixed question of law and fact on appeal. See Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). This Court reviews the trial court's findings of fact with regard to the effectiveness of counsel under a de

novo standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise. See id. “However, a trial court’s conclusions of law--such as whether counsel’s performance was deficient or whether that deficiency was prejudicial--are reviewed under a purely de novo standard, with no presumption of correctness given to the trial court’s conclusions.” Id.

After considering the entire record on appeal, we conclude that the Petitioner has failed to carry his burden of demonstrating that the evidence preponderates against the trial court’s conclusion that Counsel provided constitutionally adequate representation. As to the Petitioner’s argument that his trial counsel was deficient in failing to request a change of venue, the record reveals that Counsel did not pursue a change of venue for three legitimate reasons. First, Counsel did not advise the Petitioner to pursue a change of venue because he believed the case “did not generate[] the type of pretrial publicity” that would warrant a change of venue, and second, Counsel believed a change in venue may have actually been detrimental in the Petitioner’s case. As stated above, this Court will not use the benefit of hindsight to second-guess trial strategy or tactics. See Hellard, 629 S.W.2d at 9. Additionally, the Petitioner in this case never requested Counsel to pursue a change in venue. Using an objective standard of “reasonableness,” we cannot conclude that Counsel’s failure to request a change of venue under these circumstances amounted to deficient representation. See Strickland, 466 U.S. at 688.

Furthermore, the record before this Court also fails to support the Petitioner’s assertion that Counsel conducted an inadequate investigation and was “not sure if he had an investigator.” To the contrary, the record reflects that Counsel did hire a professional investigator as well as conduct extensive investigation himself. Counsel described in some detail the investigative work he and members of his office performed in preparation for trial. The trial court, which was familiar with the case, found the work conducted by the Petitioner’s trial counsel was more than adequate. As stated above, this Court will not re-evaluate or re-weigh the evidence presented below. See Momon 18 S.W.3d at 156. The record supports the trial court’s conclusion that the Petitioner’s trial counsel was not deficient in his investigation in this case.

Finally, the Petitioner claims he received ineffective assistance of counsel because Counsel failed to adequately cross-examine the medical examiner and/or detective about defensive wounds on the victim’s hands. According to the Petitioner, the medical examiner’s testimony at trial stating that the victim did not have any defensive wounds was contradicted by the autopsy report. However, the Petitioner has failed to show how proof of defensive wounds would be exculpatory, or indeed, how this alleged discrepancy or contradiction had any impact on his case at all. Accordingly, we cannot conclude that Counsel was deficient in his failure to pursue questioning in this area during cross-examination. Furthermore, there has been no showing of prejudice as a result of Counsel’s failure to point out an alleged contradiction in the evidence regarding the victim’s defensive wounds or lack thereof.

After examining the entire record on appeal, we conclude that the Petitioner has failed to demonstrate that his trial counsel provided deficient representation in any respect. Having found

the Petitioner failed the first prong of the Strickland test, we need not examine these issues further. Nonetheless, we note that the Petitioner has also failed to demonstrate that he was prejudiced by any of the alleged deficiencies he argued on appeal.

In sum, the Petitioner has failed to prove by clear and convincing evidence that his trial counsel's representation fell outside the wide range of reasonable professional assistance. Based on the evidence in the appellate record, the Petitioner's trial counsel provided representation that was neither deficient nor prejudicial. Accordingly, this issue is without merit.

II. Due Process Violation

The Petitioner also asserts on appeal that "even though this Court has already made a determination of the issue," the trial court should have granted him post-conviction relief because his due process rights were violated when the parties "had a plea agreement that the State withdrew from at the last minute." As acknowledged by the Petitioner, this Court did rule on direct appeal that because the "informal" plea agreement "had not yet been 'accepted' by the trial court" the "state remained at liberty to withdraw the offer." Boatfield, 2001 WL 1635447, at *8-9. Thus, the trial judge did not "abuse her discretion" in failing to accept the revoked plea agreement, and because the Petitioner did not give up any of his rights in consideration of the proposed plea agreement, his constitutional rights were not violated. Id.

It is well established law that "[t]hose issues which were previously determined by this Court on direct appeal cannot be litigated in [a] post-conviction proceeding." Harvey v. State, 749 S.W.2d 478, 479 (Tenn. Crim. App. 1987); see also Miller v. State, 54 S.W.3d 743, 747-48 (Tenn. 2001). The Petitioner's claim that his constitutional rights were violated when the State withdrew its plea agreement was the first issue addressed by this Court on direct appeal. See Boatfield, 2001 WL 1635447, at *8. Accordingly, this issue cannot be revisited in this post-conviction proceeding.

CONCLUSION

Based on the foregoing reasoning and authorities, the judgment of the trial court denying the Petitioner post-conviction relief is affirmed.

DAVID H. WELLES, JUDGE